APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sidney J. Brown, et al.,

Appellants

v.

Resolution Trust Corporation, No. 96-5075

Appellee

On Appeal from the United States District Court
for the District of Columbia

Before: **SILBERMAN** and **HENDERSON**, *Circuit Judges,* and **BUCKLEY**, *Senior Circuit Judge.*

JUDGMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(b). For the reasons set out in the accompanying memorandum, it is

ORDERED that the judgment of the district court be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

Mark J. Langer, Clerk

Sidney J. Brown, et al v. Resolution Trust Corporation, No. 96-5075

MEMORANDUM

The appellants, general partners in Nattchase Associates Limited Partnership (Nattchase), appeal the district court's dismissal of their complaint against the Resolution Trust Corporation (RTC). In June 1988, Nattchase financed the purchase of two parcels of real property in Loudon County, Virginia with a $36 million loan from the San Jacinto Savings Association (San Jacinto), secured by a nonrecourse promissory note and a deed of trust on the properties. Nattchase defaulted on the loan in 1989. RTC was appointed receiver for San Jacinto in December 1990 under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). In March 1993, RTC put the note up for sale at auction, "packaged" with other non-performing loans. RTC subsequently sold the package to CMF Loudon, L.P. (CMF), the winning bidder. When CMF attempted to foreclose on the deed of trust the appellants filed an action in the Eastern District of Virginia against RTC, San Jacinto and its affiliates and CMF and its principals. The complaint alleged, *inter alia*, that RTC had wrongfully deprived the partnership of the opportunity to bid on its note and sought declaratory relief, rescission of the sale and damages therefor.

The district court dismissed all of the plaintiff's claims with prejudice. On appeal the Fourth Circuit modified the district court's ruling to reflect dismissal *without prejudice* of most of the claims against the RTC, pending exhaustion of administrative remedies under 12 U.S.C. § 1821(d)(6)(A) and

injunctive relief, rescission of the contract of sale between RTC and CMF for the note," concluding such relief was "barred by 12 U.S.C.A. § 1821(j)."[1] *Brown v. RTC*, No. 93-2597, slip op. at 8-9 (4th Cir. July 25, 1994).

After unsuccessfully pursuing its administrative remedies, Nattchase filed this action, alleging that in excluding Nattchase from the bidding RTC (1) exceeded its statutory authority under 12 U.S.C. § 1441a(f)(1)(A),[2] (2) took the partnership's real property without compensation in violation of the fifth amend-

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[1] Section 1821(j) provides: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver."

[2] This subsection provides:

> (A) The Corporation shall prescribe regulations to prohibit the sale of assets of a failed institution by the Corporation to any person who--
>
> (A)(i) has defaulted, or was a member of a partnership or an officer or director of a corporation which has defaulted, on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution;
>
> (ii) has been found to have engaged in fraudulent activity in connection with any obligation referred to in clause (i); and
>
> (iii) proposes to purchase any such asset in whole or in part through the use of the proceeds of a loan or advance of credit from the Corporation or from any institution subject to the jurisdiction of the Corporation pursuant to paragraph (3)(A);

12 U.S.C. § 1441a(f)(1)(A).

ment[3] and (3) acted "wrongfully, unreasonably, arbitrarily, capriciously, erroneously and in bad faith." Joint Appendix (JA) 10. The district court below dismissed all three counts on various grounds. We affirm the dismissal because the appellants lack standing under Article III of the United States Constitution to pursue this action.

"'[T]he irreducible constitutional minimum of standing contains three elements,' commonly referred to as (1) injury-in-fact, (2) causation (or traceability), and (3) redressability." *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497 (D.C. Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Assuming without deciding that the appellants could otherwise prevail on a claim of wrongful exclusion from bidding,[4] we conclude that they lack standing because they cannot obtain redress in this action for any injury caused by RTC's actions.

First, the appellants are foreclosed from securing the equitable relief they seek under the doctrine of *res judicata*. Their complaint below sought a "declaratory" judgment that "the sale of the notes to CMF was illegal, null and void." This is the same claim for relief that the Fourth Circuit held was unavailable to them in the suit filed in the Eastern District of Virginia. *See Brown v. RTC*, No. 93-2597, slip op. at 8-9 (4th Cir.

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[3] The appellants have apparently abandoned their fifth amendment argument on appeal.

[4] It is likely, as the district court concluded, the appellants lack a private right action under FIRREA against RTC. *See Cort v. Ash*, 422 U.S. 66 (1975).

July 25, 1994) (quoted *supra*, upholding dismissal with prejudice of claim for recision).[5] Because the claim was "actually litigated and determined" in that suit the Fourth Circuit's affirmance of dismissal is *res judicata* and conclusive in this action. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 864 (1984). Accordingly, it does nothing to confer standing on the partners.

The partners' claim for money damages is likewise unavailing. Their complaint alleges RTC caused Nattchase "a loss of investment costs and opportunities of over $30,000." JA 8. To the extent the damages reflect the partnership's initital investment, they are attributable to that investment and the subsequent default--they were not caused by the allegedly wrongful exclusion from bidding[6] and therefore cannot confer standing to sue RTC. *See Humane Society of the United States v. Babbitt,* 46 F.3d 93, 100 (D.C. Circuit 1995) (finding no standing if "challeneged action cannot . . . be said to have 'caused' the injury complained of," which would have occurred in absence of action, foreclosing "possibility that the injury suffered . . . could be redressed by a favorable decision"). Alternatively, insofar as the complaint seeks to recover profits the partnership

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[5] The claim as set out in the complaint there sought a "[j]udgment declaring the bid process utilized and applied by the Resolution Trust Corporation, pursuant to which [defendant purchasers] purportedly acquired an interest in the financial assets offered for sale by the Resolution Trust Corporation to be void, unenforceable, and rescinded." Complaint at 25 (*Brown v. RTC,* C.A. No. 93-1450-A (E.D. Va.)) (filed Nov. 19, 1993).

[6] At oral argument the partners' counsel suggested that the partnership incurred "out of pocket expenses in attempting to prepare a package to submit for bids" but no such injury was alleged in the complaint or even mentioned in the briefs.

might have realized had it successfully bid on, purchased and developed the property, the injury alleged is simply too speculative. *See United Transp. Union v. ICC*, 801 F.2d 908, 912 (D.C. Cir. 1989) ("[I]f courts were obligated to credit complainants' predictions of future events or injuries, both the "redressability" prong and, in cases alleging prospective injury, the "fairly traceable" prong of the standing inquiry--which are, at bottom, predictions of cause and effect--would be reduced to mere pleading requirements.").

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Sidney J. Brown, et al.,

Appellants

v.

Resolution Trust Corporation, No.96-5075

Appellee

BEFORE: Silberman and Henderson, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing filed February 14, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: Robert A. Bonner
Deputy Clerk

APPENDIX 3

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Sidney J. Brown; Saul H. Bernstein; Sidney J. Brown and Saul H. Bernstein, as the General Partners of Nattchase Associates Limited Partnership on behalf of the Limited Partners Stuart G. Brown, Frederick K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; Nattchase Associates Limited Partnership; Mid City Redevelopment Corporation, No. 93-2597

Plaintiffs - Appellants,

v.

Resolution Trust Corporation; San Jacinto Savings Association, F.A.; Sajacito, Inc.; Southmark Corporation; CMF Loudoun, L.P., c/o Carl M. Freeman Associates, Inc.; Carl M. Freeman; Robert E. Sevila, Trustee,

Defendants - Appellees.

Sidney J. Brown; Saul H. Bernstein;
Sidney J. Brown and Saul H. Bernstein,
as the General Partners of Nattchase
Associates Limited Partnership on behalf
of the Limited Partners Stuart G. Brown,
Frederick K. Wine, Bradley S. Bernstein
and MDB Investments Limited Partnership;
Nattchase Associates Limited Partnership;
Mid City Redevelopment Corporation,

No. 94-1104

Plaintiffs - Appellants,

v.

Resolution Trust Corporation;
San Jacinto Savings Association,
F.A.; Sajacito, Inc.; Southmark
Corporation; CMF Loudoun, L.P.,
c/o Carl M. Freeman Associates, Inc.;
Carl M. Freeman; Robert E. Sevila,
Trustee,

Defendants - Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Loenie M. Brinkema, District Judge.
(CA-93-1450-A)
Argued: June 10, 1994
Decided: July 25, 1994
Before MURNAGHAN, WILKINS and WILLIAMS,
Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

COUNSEL

ARGUED: William W. Thompson, Jr., THOMPSON & WALDRON, Alexandria, Virginia, for Appellants. P. Matthew Sutko, RESOLUTION TRUST CORPORATION, Washington, D.C.; Philip John Harvey, SHAW, PITTMAN, POTTS & TROWBRIDGE, Alexandria, Virginia, for Appellees. ON BRIEF: Michael A. Branca, THOMPSON & WALDRON, Alexandria, Virginia, for Appellants. Munsell St. Clair, RESOLUTION TRUST CORPORATION, Washington, D.C.; Theresa V. Gorski, SHAW, PITTMAN, POTTS & TROWBRIDGE, Alexandria, Virginia; Beverlee R. Peters, Lisa Erich, S. Beryl Adler, ADLER, ROSEN & PETERS, Virginia Beach, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P.36.5 and 36.6.

OPINION

PER CURIAM:

In these consolidated appeals, Sidney J. Brown [1] challenges two orders by the district court, the first denying injunctive relief and dismissing the instant action with prejudice, and the second denying a subsequent motion to vacate or modify the dismissal order. Brown argues that his claims against Resolution Trust Corporation (RTC) should not have been dismissed, despite his failure to pursue the applicable administrative remedies as required by 12 U.S.C.A. §1821(d)(6)(A), (13)(D)(ii) (West 1989), because RTC's exclusion of Brown from the bidding process was an act which exceeded RTC's statutory authority. Brown next argues that the district court erred in concluding that he had failed to state a cognizable cause of action against either RTC or CMF Loudoun, L.P., and its principal, Carl M. Freeman (CMF). Brown's last contention challenges the denial of injunctive relief as to RTC's transfer of the promissory note in question to CMF and CMF's subsequent foreclosure thereon.

We find that Brown's failure to pursue his claims against RTC under the applicable administrative procedures bars federal jurisdiction to review those claims. We therefore

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[1] This action was initiated, and this appeal is pursued, by several individuals and business entities, including Brown, Saul H. Bernstein, Nattchase Associates Limited Partnership (Nattchase), Brown and Bernstein as general partners of Nattchase on behalf of its limited partners, and Mid City Redevelopment Corporation. We refer to Appellants jointly as Brown.

affirm the dismissal of all claims against RTC, amending that disposition to reflect a dismissal without prejudice to allow pursuit of the available administrative relief. Finding no error as to the dismissal of Brown's claim against CMF, we affirm the dismissal with prejudice. Finally, we affirm the district court's denial of injunctive relief.

I.

In June 1988, Nattchase obtained a $36 million loan from the San Jacinto Savings Association. The loan was secured with a non-recourse promissory note and deed of trust on real property located in Loudoun County, Virginia. The loan went into default in 1989. RTC was appointed receiver for San Jacinto Savings Association in December 1990. In July 1993, RTC sold the note to CMF, as part of a package of non-performing loans from failed thrifts, after an auction and bidding process between March and May 1993. CMF subsequently sought to foreclose on the deed of trust securing the note. Brown initiated this action in an attempt to halt that foreclosure.

Brown's primary complaint is that RTC improperly excluded him from bidding on the note securing the Loudoun County property, and thereby deprived him of the opportunity to recoup his investment in that property. Brown also contends that CMF was unjustly enriched through Brown's efforts. The complaint--seeking, *inter alia,* a declaratory judgment finding RTC's bidding procedures unconstitutional, rescission of the contract of sale between RTC and CMF, a judgment requiring another bidding process for the note, injunctive relief against

CMF's scheduled foreclosure, and related damages--was dismissed with prejudice.

In considering Brown's various challenges to the dismissal of his complaint, we turn first to his claims against RTC.

II.

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) provides that, "[e]xcept as otherwise provided in this subsection, no court shall have jurisdiction over . . .(ii) any claim relating to any act or omission of such institution or the Corporation as receiver." 12 U.S.C.A. §1821(d)(13)(D); *see also* 12 U.S.C.A. §1821(d)(6)(A) (de novo judicial review permitted only after exhaustion of available administrative procedures). This court, like most other circuit courts,[2] has determined that claimants must submit their claims against RTC to the administrative claims process established by FIRREA before seeking judicial review. *Brady Dev. Co. v. RTC,* 14 F.3d 998, 1003 (4th Cir. 1994) ("Congress sought to ensure that *all* claims undergo the administrative

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[2] *See, e.g., Heno v. FDIC,* 20 F.3d 1204, 1206-07 (1st Cir. 1994); *Bueford v. RTC,* 991 F.2d 481, 484 (8th Cir. 1993); *Henderson v. Bank of New England,* 986 F.2d 319, 321 (9th Cir.), *cert. denied,* 114 S.Ct. 559 (1993); *Office & Professional Employees Int'l Union, Local 2 v. FDIC,* 962 F.2d 63, 66 (D.C.Cir. 1992); *Meliezer v. RTC,* 952 F.2d 879, 882 (5th Cir. 1992); *RTC v. Elman,* 949 F.2d 624, 627 (2d Cir. 1991); *RTC v. Mustang Partners,* 946 F.2d 103, 106 (10th Cir. 1991); *FDIC v. Shain, Schaffer & Rafanello,* 944 F.2d 129, 136 (3d Cir. 1991); *see also Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.,* 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute.").

claims process and are under the exclusive control of the RTC.") (emphasis added). This exhaustion requirement applies to claims arising both before and after RTC's appointment as receiver, *Rosa v. RTC,* 938 F.2d 383, 392-93 (3d Cir.), *cert. denied,* 112 S.Ct. 582 (1991), and to declaratory judgment actions. *See Henderson v. Bank of New England,* 986 F.2d 319, 321 (9th Cir.) (§1821(d)(13)(D) "bars judicial review of any non-exhausted claim, *exhausted or nonmonetary,* which is 'susceptible of resolution through the claims procedure'")(quoting *Rosa,* 938 F.2d at 394) (emphasis added), *cert. denied,* 114 S.Ct. 559 (1993); *Feise v. RTC,* 815 F.Supp. 344, 347 (E.D.Cal. 1993) (declaratory judgment claims barred by §1821(d)(13)(D)).

Brown erroneously argues that, because RTC acted outside its statutory authority in excluding him from the bidding process, FIRREA's administrative process is inapplicable to his claims. To the contrary, RTC's transfer of the assets of the failed San Jacinto Savings Association to CMF was clearly an act within its statutory authority. 12 U.S.C.A. §1821(d)(2)(B), (E), (G)(i)(II) (West 1989 & Supp. 1994). RTC's exclusion of Brown from the bidding process constitutes, at best, an erroneous determination by RTC as to permissible bidding participants. "[E]ven if the RTC improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers." *Ward v. RTC,* 996 F.2d 99, 103 (5th Cir. 1993). Hence, Brown must first pursue his claims under FIRREA's administrative scheme.

Brown also argues that resort to the administrative scheme would be futile, as purportedly evidenced by RTC let-

ters responding to Brown's inquiries after transfer of the note to CMF.[3] This argument is similarly without merit, because judicially-created futility exceptions cannot supplant statutorily-promulgated exhaustion requirements. *Weinberger v. Salfi,* 422 U.S. 749, 766 (1975); *FDIC v. Shain, Schaffer & Rafanello,* 944 F.2d 129, 136 (3d Cir. 1991). Moreover, the letters relied upon by Brown are "not necessarily conclusive of the receiver's determination of [Brown's] claims" since "[i]f RTC as receiver were to allow and satisfy [Brown's] claims in whole or in part, the dispute now before this court would be moot to that extent." *Rosa,* 938 F.2d at 395. There is no plausible basis for the futility exception absent "'a hard and fast

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[3] The first letter to RTC, dated September 8, 1993, and characterized by Brown as a flat refusal to consider Brown's claims, read in pertinent part:

> While I understand you may be disheartened by the demands of the new owner and holder of your loan, I fail to see any action which can or will be taken, or on behalf of the RTC in this regard. Please allow this to confirm that the RTC cannot, and will not honor your request to set aside the sale and re-advertise the package, allowing NALP [i.e., Nattchase] to bid. Any further issues which you wish to raise relative to the Loan should be raised with the new owner and holder of the same, as the RTC (as conservator, receiver or otherwise) no longer maintains any right, title or interest in the Loan.

(J.A. at 83-84.) Brown contends that the second letter from RTC, actually a series of letters to him, Bernstein, Nattchase, and Mid City, dated November 29, 1993, with enclosed proof-of-claim forms, contemplates only monetary claims against failed institutions and not claims against RTC itself. However, the letters actually concern any claims "for payment from, or . . . determination[s] of rights with respect to the assets of a failed institution, or . . . claim[s] relating to any act or omission of a failed institution . . . ." (J.A. at 86, 87, 88, 89.)

position [by RTC] that [makes] an adverse ruling a certainty,'" because "[t]o excuse exhaustion based on an 'unsupported allegation of futility would allow the futility exception to swallow the exhaustion rule.'" *Darby v. Kemp,* 957 F.2d 145, 148 (4th Cir. 1992) (quoting *Thetford Properties IV Ltd. v. United States Dep't of Housing & Urban Dev.,* 907 F.2d 445, 450 (4th Cir. 1990)), *reversed on other grounds,* 113 S.Ct. 2539 (1993). Contrary to Brown's argument, resort to the FIRREA administrative scheme is not futile.

For these reasons, we find that the district court properly dismissed Brown's claims against RTC, pending presentation of his claims to RTC under the statutory administrative procedures. However, consistent with RTC's concession, we modify that disposition to reflect a dismissal without prejudice of Brown's claims against RTC, so that Brown may indeed pursue his claims according to that statutory scheme.[4] *See* 28 U.S.C. §2106 (1988).

III.

Our determination that Brown must first utilize FIRREA's administrative scheme with regard to his claims against RTC does not preclude *de novo* review of the district court's Fed.R.Civ.P. 12(b)(6) dismissal with prejudice of Brown's unjust enrichment claim against CMF. *See Estate Constr. Co. v. Miller & Smith Holding Co.,* 14 F.3d 213, 217 (4th Cir.1994) (standard of review).

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[4] Given this disposition, we dismiss as moot RTC's motion to dismiss the appeal for failure to exhaust the statutory administrative procedures.

Under Virginia law, the applicable state law in this case, unjust enrichment requires proof that the plaintiff conferred a benefit on the defendant, which was requested and accepted by the defendant under circumstances that reasonably notified him that the plaintiff expected compensation from the defendant. *Raymond, Colesar, Glaspy & Huss v. Allied Capital Corp.*, 961 F.2d 489, 491 (4th Cir. 1992); *Kern v. Freed, Co.*, 299 S.E.2d 363, 365 (Va. 1983). Brown has not alleged, and there is no support in the record, that he conferred any benefit on CMF, or that CMF requested or received any benefit from Brown. CMF merely purchased a promissory note from RTC on which Nattchase is liable. Because no relief can be granted to Brown under any set of facts that could be proven consistent with the allegations in this complaint, the district court properly dismissed that cause of action with prejudice, and we affirm that disposition. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989).

IV.

We also find that the district court did not abuse its discretion in denying Brown's requested injunctive relief. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991) (standard of review).

Brown's first requested injunctive relief, rescission of the contract of sale between RTC and CMF for the note, is expressly barred by 12 U.S.C.A. §1821(j) (West 1989): "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions

of the Corporation as a conservator or a receiver." *See In re Landmark Land Co.*, 973 F.2d 283, 290 (4th Cir. 1992) ("The comprehensive scheme of FIRREA indicates Congress' intent to allow the RTC full rein to exercise its statutory authority without injunctive restraints imposed by bankruptcy courts or district courts in other proceedings."). We joint the First, Second, Fifth, Sixth, and District of Columbia Circuits in holding that §1821(j) forbids equitable rescission, as sought by Brown in this case.[5] The district court, therefore, properly denied Brown's motion for injunctive relief against RTC.

Brown also sought a temporary restraining order against CMF, enjoining its imminent foreclosure on the note purchased from RTC. As demonstrated by our discussion in Part III, there is no cognizable unfair enrichment cause of action in this case, thereby precluding any basis for injunctive relief against the scheduled foreclosure. Hence, the district court also properly denied the requested temporary restraining order against CMF.

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[5] *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir. 1994), *reinstating* 995 F.2d 238, 239 (D.C. Cir. 1993); *Heno*, 20 F.3d at 1208 n.8; *Ward*, 996 F.2d at 104; *United Liberty Life Insurance Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir. 1993); *Harkness Apt. Owners Corp. v. FDIC*, No. 87 Civ. 7080, 1993 U.S. Dist. LEXIS 5452, at *8-9 (S.D.N.Y. Apr. 26, 1993), *aff'd without op.*, 999 F.2d 538 (2d Cir. 1993).

V.

Finally, the district court did not abuse its discretion in its subsequent denial of Brown's Fed.R.Civ.P. 60(b) motion, seeking vacatur of the district court's order denying injunctive relief and dismissing his complaint. *United States v. Williams,* 674 F.2d 310, 312 (4th Cir. 1982) (standard of review). According to Brown's motion, vacatur was necessary due to various alleged mistakes of law in the dismissal order. Our review of that motion reveals that it is "nothing more than a request that the district court change its mind," which "is not authorized by Rule 60(b)." *Williams,* 674 F.2d at 313; *see also Smith v. Evans,* 853 F.2d 155, 158 (3d Cir. 1988) (legal error, without more, cannot justify granting a Rule 60(b) motion). Moreover, as we have concluded, the order was not erroneous. Hence, Brown's Rule 60(b) motion was properly denied.

VI.

For the reasons stated herein, we affirm the district court's dismissal with prejudice of Brown's claim against CMF, and its denial of injunctive relief. We modify the dismissal of Brown's claims against RTC to reflect a dismissal without prejudice, and affirm that disposition. Finally, we affirm the district court's denial of Brown's Rule 60(b) motion.

AFFIRMED AS MODIFIED

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sidney J. Brown, et al.,

Plaintiffs,

Civil Action No. 95-00334(NHJ)

v.

Federal Deposit Insurance
Corporation,

Defendant.

ORDER

Presently before the Court are the motions of defendant to dismiss the complaint and for removal of *lis pendens*. Upon consideration of the motions, memoranda in support and opposition, and for the reasons set forth in a Memorandum Opinion issued on this date, the Court will grant the motion to dismiss and deny the motion for removal of *lis pendens*. Accordingly, it is this 14th day of February, 1996,

ORDERED that defendant's motion to dismiss the complaint be, and hereby is, granted; it is further

ORDERED that defendant's motion for removal of *lis pendens* be, and hereby is, denied; and it is further

ORDERED that this case be, and hereby is, closed.

NORMAL HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

Before the Court are the motions of defendant to dismiss the complaint and direct removal of *lis pendens*. Upon consideration of the motions, memoranda in support and opposition, and for the reasons set forth below, the Court will grant the motion to dismiss and deny the motion to direct removal of *lis pendens*.

BACKGROUND

Plaintiffs Sidney Brown and Saul Bernstein, general and limited partners of Nattchase Associates Limited Partnership ("Nattchase"), bring this suit as individuals and as general partners on behalf of the limited partnership (collectively, "Brown").[1] In June 1988, Nattchase borrowed $36,000,000 from San Jacinto Savings Association, securing the loan with

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[1] The complaint fails to describe the interest of plaintiff Mid-City Development Corporation in these proceedings. As the Court dismisses the complaint as to all plaintiffs, the Court need not address the failure of plaintiff Mid-City Development Corporation to plead a cause of action.

a non-recourse purchase money note (the "Nattchase Note") and a deed of trust on certain real property located in Loudoun County, Virginia. In December 1990, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), the Office of Thrift Supervision appointed the Resolution Trust Corporation (the "RTC") as receiver for San Jacinto Savings Association.

Nattchase defaulted on its loan sometime in 1989. In March 1993, the RTC included the Nattchase Note in a "pool" of non-performing loans put out for bid. Included in terms of the bid package was a statement that the RTC would not accept bids from defaulted borrowers who had not settled their defaulted obligations. Brown claims that Nattchase did not make a bid on the Nattchase Note because of this prohibition against bids from defaulted borrowers.

The RTC sold the pooled notes to CMF Loudoun L.P. ("CMF") for $14,000,000 of which $5,000,000 was allocable to the Nattchase Note. Brown claims that during settlement negotiations with the RTC before the sale of the pooled notes, Nattchase offered to purchase the Nattchase Note for more than the amount ultimately realized in the sale to CMF. After its purchase of the pooled notes, CMF moved to foreclose on the Loudoun County, Virginia, property securing the Nattchase Note.

In November 1993, Brown bought an action in the U.S. District Court for the Eastern District of Virginia against the RTC, San Jacinto Savings Association, Sajacito, Inc., Southmark Corporation, CMF, and Carl Freeman. *See* Brown v. Resolu-

tion Trust Corp., 1994 U.S. App. Lexis 18730 (4th Cir. 1994), *cert denied*, 115 S.Ct. 1994 (1995). Brown alleged that "the RTC improperly excluded him from bidding on a note securing the Loudoun County property, and thereby deprived him of the opportunity to recoup his investment in that property." *Id.* at 4. Brown also contended that CMF was unjustly enriched through Brown's efforts. *Id.* The complaint sought a declaratory judgment finding the RTC's bidding procedures unconstitutional, rescission of the contract of sale between the RTC and CMF, a judgment requiring another bidding process for the note, and injunctive relief against CMF's scheduled foreclosure. *Id.* The district court dismissed Brown's claims with prejudice.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's denial of injunctive relief to rescind the contract. While the Appellate Court affirmed the district court's dismissal with prejudice of the claims against CMF, the Court found that the district court should have dismissed without prejudice the claims against the RTC so that Brown might re-file the claims after exhausting his administrative remedies.

The RTC denied Brown's proof of claim on February 21, 1995, and Brown filed this action. In Count One of the complaint, Brown seeks a declaratory judgment that the RTC's sale of the Nattchase Note to CMF was illegal, null and void. In Count Two, Brown claims that the RTC took his property without compensation in violation of the Fifth Amendment. In Count Three, Brown claims that the RTC acted "wrongfully, unreasonably, arbitrarily, capriciously, erroneously, and in bad

faith" when it excluded him from the bidding process and denied his proof of claim.

DISCUSSION

I.

In ruling on the motion to dismiss, the Court must treat the allegations in the complaint as true. Berkovitz v. United States, 486 U.S. 531, 540 (1988). Even accepting Brown's allegations as true, it appears that his claims must fail as a matter of law. Brown argues in Count One that the sale of the Nattchase note by the RTC to CMF was illegal, null, and void. As Brown litigated -- and lost -- this issue when he sought recision of the sales agreement in the Fourth Circuit, the doctrine of *res judicata* bars Brown's request for judgment declaring the contract void. *See* Brown v. Resolution Trust Corp., 1994 U.S. App. Lexis 18730 at *7 (finding that the RTC's transfer of assets to CMF was clearly within its statutory authority). The Court will dismiss this Count.

Brown argues next that the RTC deprived him of the Nattchase Note and his interest in the Loudoun County, Virginia, property, without just compensation. Brown's claim is utterly without merit. First, it is clear that the RTC did not deprive Brown of the Nattchase Note. Brown was the *obligor* on the Note. San Jacinto Savings Association owned the note. The RTC, as receiver for San Jacinto Savings Association, sold the thrift's property to CMF. Second, the RTC did not deprive Brown of his interest in the Loudoun County, Virginia property. Brown lost his interest in that property when CMF foreclosed on the Nattchase Note. The RTC was not a party to the foreclosure action. As Brown's damages, if any, flow directly from his own action -- his 1989 default on the Nattchase

Note -- the Court will dismiss Count Two for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12 (b)(6).

Brown's final claim is the central issue in this dispute. Brown claims in Count Three of the complaint that:

> [b]y excluding Plaintiff's from bidding on the notes securing the properties and by denying Plaintiff's Proof of Claim, Defendant RTC acted wrongfully, unreasonably, arbitrarily, capriciously, erroneously and in bad faith, and Defendant is liable to Plaintiffs for all damages resulting therefrom.

Turning first to Brown's complaint that the RTC wrongfully denied his proof of claim, there is no judicial review of a decision by the RTC not to allow a claim. 12 U.S.C. § 1821 (d)(5)(E). Thus Brown, has failed to state a valid claim with respect to this issue. Next, turning to Brown's complaint that the RTC wrongfully excluded him from bidding on the Nattchase Note, there are no provisions in the Act or the agency's regulations that require the RTC to allow an interested party to bid on thrift properties. Although Congress has specified that certain persons may *not* bid on properties held by the RTC as receiver, 12 U.S.C. § 1441a(a)(f)(1),[2] it has entrusted the section of all other offerors to agency discretion.

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[2] Under 12 U.S.C. § 1441a(a)(f)(1), the RTC is required to develop regulations to prohibit the sale of thrift assets to certain categories of persons who have caused substantial losses to the failed institution.

See 12 U.S.C. § 1821(d)(2)(G)(i)(II) (granting the RTC full discretion in disposing of thrift assets).

Even assuming *arguendo* that Brown's exclusion from bidding on the notes violated the Act, Brown lacks standing to seek judicial relief. FIRREA contains an elaborate series of administrative procedures to settle claims brought by a failed thrift's creditors. *See* 12 U.S.C. § 1821(d)(5)-(8). After exhaustion of the administrative procedures, a claimant may bring the claim *de novo* in court or seek further agency review. *See* 12 U.S.C. § § 1821(d)(5)(E), 1821 (d)(6)(A). These procedures are the Act's only express private causes of action against the RTC. As even Brown does not contend that an action for enforcement of an alleged "right to bid" falls under the provision for adjudication of creditors' claims, Brown urges the Court to find an "implied private cause of action" under 12 U.S.C. § 1441a(a)(14)(B)(viii).

It is well-settled that a court may imply a prive right of action only when there is clear evidence that Congress so intended. Cort v. Ash, 422 U.S. 66, 78 (1975). There is no such evidence here. Under 12 U.S.C. § 1441a(a)(14)(B)(viii), Congress instructed the Thrift Depositor Oversight Protection Board to establish minimum policies and procedures, including "[s]tandards for adequate competition and fair and consistent treatement of offerors." The congressonal intent in 12 U.S.C. § 1441a(a)(14)(B)(viii) was to develop policies and documentation to provide a basis for later *government review* of RTC disposition activities. *See* H.R.Rep. 101-54, 101st Cong., 1st Sess., pt. 1, at 358, 361. Further, the Act expressly prohibits judicial review of claims seeking determination of a party's

rights with respect to any acts or omissions by the agency as receiver unless those acts are covered under the procedures, discussed *supra*, for creditor claims.[3] 12 U.S.C. § 1821(d)(13)(D)(ii). Accordingly, the Court will dismiss Count Three for failure to state a claim upon which relief may be granted.

II.

On April 18, 1995, Brown filed a *lis pendens* in the Circuit Court of Loudoun County, Virginia, on the property at issue in this suit. Defendant has filed a motion requesting the Court to direct Brown to remove the *lis pendens*, arguing that when, as here, the dispute over property involves money damages rather than a title dispute, *lis pendens* is improper.[4] While defendant may be correct, the Court cannot imagine why defendant chose to file this motion in district court in the District of Columbia.

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[3] 12 U.S.C. § 1821(d)(13)(D)(ii) provides that:

> Except as otherwise provided in this subsection, no court shall have jurisidction over --
>
> (i) any claim or action for payment seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed as receiver, including assets which the Corportion may acquire from itself as such receiver; or
>
> (ii) any claim relating to any actio or omission of such institution or the Corporation as receiver.

[4] In Virginia, a *lis pendens* serves as notice to third parties that there is litigation that may affect title to property. 12A Mitchie's Jurisprudence of Va. & W.V., § 2 at 390.

Brown filed the *lis pendens* in state court in Virginia. The property at issue is located in Virginia. CMF, the title-holder, is not a party to this action. As the court does not have jurisdiction over this issue, the Court must deny the motion.

CONCLUSION

The Court will grant defendant's motion to dismiss the complaint and deny defendant's motion for removal of *lis pendens*. An Order consistent with the conclusions in this Memorandum Opinion will issue on this date.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Dated: February 14, 1996

APPENDIX 5

12 U.S.C. § 1441a(a)(14)

(14) Strategic plan for Corporation operations

(A) In general

The chief executive officer of the Corporation is authorized to implement the strategic plan for conducting the Corporation's functions and activities submitted by the former Oversight Board to the Congress, dated December 31, 1989.

(B) Provisions of plan

The strategic plan and implementing policies and procedures required under the paragraph shall at a minimum contain the following:

(i) Factors the Corporation shall consider in deciding the order in which failed institutions or categories of failed institutions will be resolved.

(ii) Standards the Corporation shall use to select the appropriate resolution action for a failed institution.

(iii) With respect to assisted acquisitions, factors the Corporation shall consider in deciding whether nonperforming assets of the failed institution will be transferred to the acquiring institution rather than retained by the Corporation for management and disposal.

(iv) Plans for the disposition of assets.

(v) Management objectives by which the Corporation's progress in carrying out its duties under this section can be measured.

(vi) A plan for the organizational structure and staffing of the Corporation, including an assessment of the extent to which the Corporation will perform asset management functions and other duties through contracts with public and private entities.

(vii) Consideration of whether incentives should be included in asset management functions and other duties through contracts with public and private entities.

(viii) Standards for adequate competition and fair and consistent treatment of offerors.

(ix) Standards that prohibit discrimination on the basis of race, sex, or ethnic group in the solicitation and consideration of offers.

(x) Procedures for the active solicitation of offers from minorities and women.

(xi) Procedures requiring that unsuccessful offerors be notified in writing of the decision within 30 days after the offer has been rejected.

(xii) Procedures for establishing the market value of assets based upon standard market analysis, valuation, and appraisal practices.

(xiii) Procedures requiring the timely evaluation of purchase offers for an institution.

(xiv) Procedures for bulk sales and auction marketing of assets.

(xv) Guidelines for determining if the value of an asset has decreased so that no reasonable recovery is anticipated. In such cases, the Corporation may consider potential public uses of such asset including providing housing for lower income families (including the homeless), day care centers for the children of low and moderate-income families, or such other public purpose designated by the Secretary of Housing and Urban Development.

(xvi) Guidelines for the conveyance of assets to units of general local government, States, and public agencies designated by a unit of general local government or a State, for use in connection with urban homesteading programs approved by the Secretary of Housing and Urban Development under section 1706e of this title.

(xvii) Policies and procedures for avoiding political favoritism and undue influence in contracts and decisions made by the Thrift Depositor Protection Oversight Board and the Corporation.

APPENDIX 6

12 U.S.C. § 1821(d)(6)(A)

(6) **Provision for agency review or judicial determination of claims**

(A) In general

Before the end of the 60-day period beginning on the earlier of —

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i).

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(13)

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall —

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to the assets of

any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) Any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which —

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination of the basis of race, sex or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low and moderate-income individuals.